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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5344

JAMES RAYMOND MOORE,

Petitioner,

v.

ILLINOIS,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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UNDER THE RECENT DECISION OF THIS
COURT IN *MANSON v. BRATHWAITE*, NO. 75-871,
A PER SE EXCLUSIONARY RULE IS NOT AP-
PLICABLE IN THIS CASE DESPITE USE OF
EVIDENCE OF SUGGESTIVE IDENTIFICATION
AT TRIAL.

The purpose of this supplemental brief is twofold: to correct a factual assertion in Petitioner's brief on the merits that was in error, and to supplement Respondent's

argument in light of this Court's decision in *Manson v. Brathwaite*, No. 75-871, decided June 16, 1977.

In Respondent's brief on the merits, counsel made a factual assertion from the record that was clearly incorrect. In the brief on page 9, it was stated that:

"Even though the December 21, 1967 confrontation was held without the presence of counsel, there was no later testimony at trial concerning the identification made at that time. Evidence of the confrontation was not later used to buttress Miss Miller's in-court identification."

In light of Miss Miller's testimony at R-234 (A-75), that assertion was in error. It is clear that Miss Miller testified during the State's case-in-chief that she had identified the Petitioner at the December 21, 1967 confrontation. Counsel for the Respondent respectfully requests that the Court take note of that fact and accept his apology for the error.

The fact that evidence of the identification was used at trial, however, does not affect the issues in this case. In *Manson v. Brathwaite*, 21 Cr. L. 3120, this Court recently rejected application of an inflexible *per se* exclusionary rule to suggestive identifications in favor of the "totality of the circumstances" test of *Stovall v. Denno*, 388 U.S. 293 (1967) and *Neil v. Biggers*, 409 U.S. 188 (1972). In *Manson*, a trained police officer identified the defendant through a single photograph which he viewed several days after the crime and that photo was admitted as evidence at trial. This Court held that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations."

The decision in the case at bar will not turn on a mechanical application of the exclusionary rule as urged by Petitioner, but upon a determination of the reliability of the in-court identification utilizing the factors set out in *Biggers*.

Those factors are analyzed in Respondent's brief and indicate that the identification was reliable and not violative of Due Process. Respondent respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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